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6 IN THE UNITED STATES DISTRICT COURT  
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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10 ADRIAN MORRIS, individually and on  
11 behalf of all others similarly situated,

No. C 17-06027 WHA

12 Plaintiff,

13 v.

14 FIDELITY INVESTMENTS, FMR LLC,  
15 and FIDELITY BROKERAGE SERVICES  
16 LLC,

Defendants.  
\_\_\_\_\_ /

**ORDER RE FINAL APPROVAL  
AND MOTION FOR  
ATTORNEY'S FEES, COSTS,  
AND AN ENHANCEMENT  
AWARD**

17  
18 **INTRODUCTION**

19 In this wage-and-hour class action, plaintiff moves for final approval of a class action  
20 settlement and FLSA settlement. Class counsel moves for attorney's fees, litigation costs, and  
21 an incentive award. Defendants do not oppose. For the reasons below, final approval is  
22 **GRANTED**. The motion for attorney's fees, litigation costs, and an incentive award is **GRANTED**  
23 to the extent stated below and otherwise **DENIED**.

24 **STATEMENT**

25 Prior orders set forth the background of this case (*see, e.g.*, Dkt. Nos. 50, 70). In short,  
26 plaintiff Adrian Morris worked as a non-exempt financial representative for defendant Fidelity  
27 Brokerage Services LLC and participated in the company's quarterly-bonus, student-loan-  
28 repayment, and fitness-reimbursement programs. Plaintiff alleges defendants failed to pay her  
earned overtime wages by miscalculating her regular rate of pay with respect to her "bonus

1 overtime” and by failing to consider compensation paid under these programs when calculating  
2 her regular rate of pay for overtime purposes.

3 In February 2018, plaintiff filed an amended complaint asserting claims for unpaid  
4 overtime and claims for wage statement violations and waiting time penalties. Plaintiff also  
5 asserted a claim under California’s Private Attorneys General Act (Dkt. No. 34).

6 A June 2018 order dismissed defendant Fidelity Investments from this action but denied  
7 FMR’s motion to dismiss, finding that the amended complaint alleged sufficient facts to sue  
8 FMR as plaintiff’s joint employer. Following the parties’ stipulation, a June 2018 order certified  
9 a California-based class and a nationwide FLSA collective (Dkt. Nos. 50–51).

10 Following a settlement conference with Chief Magistrate Judge Spero, the parties  
11 reached a settlement of plaintiff’s class and collective claims. In December 2018, plaintiff filed  
12 an unopposed motion for preliminary approval of the class settlement and for approval of the  
13 FLSA settlement. During a January 2019 hearing on the motion, the undersigned distributed a  
14 tentative ruling which identified certain flaws in the proposed settlement. The parties, having  
15 negotiated a revised settlement to address these issues, filed a supplemental brief describing their  
16 changes (Dkt. Nos. 60, 68).

17 A February 2019 order granted preliminary approval of the class and collective action  
18 settlement. The same order approved, as to form and content, a proposed notice concerning the  
19 class settlement agreement and final approval hearing (Dkt. No. 70). The settlement  
20 administrator mailed notice of the proposed class settlement to 7,530 class members. 413 of  
21 these notices were initially returned as undeliverable, but the claims administrator was able to  
22 obtain 355 updated addresses and resend the notices. Only three members opted out and no class  
23 members have objected to the settlement (Mot. at 7).

24 Plaintiff now moves for final approval of the class settlement agreement and FLSA  
25 settlement agreement. Class counsel moves for an award of attorney’s fees, litigation costs, and  
26 an incentive award. Defendant does not oppose. This order follows full briefing and oral  
27 argument.  
28

## ANALYSIS

Federal Rule of Civil Procedure 23(e) provides that “[t]he claims, issues, or defenses of a certified class . . . may be settled . . . only with the court’s approval.” When a proposed settlement agreement is presented, the district court must perform two tasks: (1) direct notice in a reasonable manner to all class members who would be bound by the proposal, and (2) approve the settlement only after a hearing and on finding that the terms of the agreement are fair, reasonable, and adequate. FRCP 23(e)(1)–(2).

### 1. FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT.

#### A. Adequacy of Notice.

The notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citations omitted). It must also describe “the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980). The undersigned judge previously approved the proposed class notice provided that the missing information in the notices was filled out (Dkt. No. 70). As described above, the claims administrator has fulfilled the notice plan. This order accordingly finds that notice to class members is adequate.

#### B. Scope of Release.

As stated in the motion granting preliminary approval of the proposed settlement, the agreement appropriately defines the class and collective using the same definitions set forth in the class certification order. The proposed settlement agreement releases only claims actually asserted in this action and those seeking relief based on substantially the same recovery.

Fidelity is also a defendant in the case *Reynolds et al. v. Fidelity Investments Operations Company, Inc. et al.*, Case No. 1:18-cv-00423 (M.D.N.C.), and the proposed settlement specifically states that neither the class nor the collective release extends to claims in that lawsuit that were beyond the facts alleged here and specifically excludes the primary claim in *Reynolds* for unpaid pre-shift work. Accordingly, the scope of the class and collective definition, release,

1 and treatment of other pending litigation in the proposed settlement agreement is appropriately  
2 tailored and approved.

3 **C. Fairness, Reasonableness, and Adequacy of Proposed Settlement.**

4 A district court may approve a proposed class settlement only upon finding that it is fair,  
5 reasonable, and adequate, taking into account (1) the strength of the plaintiff's case; (2) the risk,  
6 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class  
7 action status throughout the trial; (4) the amount offered in settlement; (5) the extent of  
8 discovery completed and the stage of the proceedings; (6) the experience and view of counsel;  
9 (7) the presence of a governmental participant; and (8) the reaction of the class members to the  
10 proposed settlement. FRCP 23(e); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944  
11 (9th Cir. 2015). For the following reasons and for the reasons stated in the order granting  
12 preliminary approval of the proposed settlement agreement (Dkt. No. 70), this order finds that  
13 the proposed class settlement is fair, reasonable, and adequate under FRCP 23(e).

14 The gross settlement fund will be more than one hundred percent of the \$1,071,404 in  
15 wages that plaintiff contends is owed to the class and collective. Pursuant to PAGA, a sum of  
16 \$15,000 will be paid to the California Labor and Workforce Development Agency out of the  
17 gross settlement fund. Furthermore, the class representative and class counsel have adequately  
18 represented the class. The parties reached the proposed settlement after nearly two years of  
19 litigation and a settlement conference with Chief Magistrate Judge Spero, the scope of the class  
20 definition and release in the settlement agreement is appropriately tailored, and no class member  
21 has objected to the settlement.

22 *Second*, the plan of allocation of the settlement proceeds is fair and reasonable. The net  
23 settlement after the deduction of expenses and attorney's fees will be distributed on a *pro rata*  
24 basis among class members based on the actual amount of unpaid wages each member would  
25 receive if plaintiff established her claims at trial. Moreover, the proposed settlement agreement  
26 does not require class members to participate in a claims process in order to claim their share of  
27 the settlement fund. In the event that any class or collective member does not cash their  
28 settlement check after the claims administrator goes through the address updating procedures,

1 the claims administrator will re-distribute the funds from any uncashed checks pro rata to  
2 currently employed class and collective members through its payroll system. The settlement  
3 accordingly has no reserve fund. In short, having considered the applicable factors, this order  
4 finds the proposed class settlement is fair, reasonable, and adequate so as to warrant final  
5 approval. Accordingly, final approval of the proposed class settlement and plan of allocation is  
6 **GRANTED.**

7 **2. FLSA COLLECTIVE SETTLEMENT.**

8 Plaintiff also moves for final approval of a settlement of plaintiff's FLSA claims. The  
9 FLSA prohibits traditional class actions and authorizes only an opt-in collective action. 29  
10 U.S.C. § 216(b). A proposed FLSA settlement must be "a fair and reasonable resolution of a  
11 bona fide dispute over FLSA provisions." *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct.  
12 1523, 1527–30 (2013). This order finds that the parties have a bona fide dispute regarding  
13 overtime wages and that the settlement represents a reasonable compromise of those claims.  
14 Defendants have continued to deny liability, and there is thus a distinct possibility that plaintiff  
15 would have recovered nothing had she pursued the action through trial. The extent to which the  
16 parties had conducted discovery and the experience and views of counsel also weigh in favor of  
17 approving the settlement. Furthermore, no class or collective member has objected to the  
18 settlement based on the parties' revised notice procedure (Mot. at 7). This order accordingly  
19 finds that the proposed settlement is a fair, reasonable, and adequate resolution of plaintiff's  
20 FLSA claims and is accordingly **APPROVED.**

21 **3. MOTION FOR ATTORNEY'S FEES, EXPENSES, AND INCENTIVE AWARD.**

22 **A. Expenses.**

23 Class counsel seeks \$13,290.79 in litigation costs. The largest component of these  
24 expenses is "data expert" (\$10,134.50). The next largest component is "travel" (\$1,574.03).  
25 Counsel also seeks reimbursement for filing fees and service charges (\$664.09), postage  
26 (\$23.01), research (\$330.50), and copies (\$564.66). These expenses were a reasonable and  
27 necessary part of the litigation, and are of a type customarily billed to a fee-paying client. No  
28

1 class member objected to recovery of these costs. The motion for reimbursement of these costs  
2 is **GRANTED**.

3 **B. Enhancement Award.**

4 Plaintiff requests a \$5,000 enhancement award. Generally, a class representative should  
5 not get a bonus. In this case, counsel at oral argument represented that the class representative  
6 attended the parties' settlement conference and spent approximately 40 hours assisting counsel  
7 with the case. As such, the class representative shall be awarded a \$500 enhancement award.  
8 The motion for an enhancement award is **GRANTED** to the extent stated above.

9 **C. Attorney's Fees.**

10 A district court must ensure that attorney's fees are "fair, adequate, and reasonable," even  
11 if the parties have entered into a settlement agreement that provides for those fees. *Staton v.*  
12 *Boeing Co.*, 327 F.3d 938, 963–64 (9th Cir. 2003). "In 'common-fund' cases where the  
13 settlement or award creates a large fund for distribution to the class, the district court has  
14 discretion to use either a percentage or lodestar method." Our court of appeals has recognized  
15 25 percent of the common fund as a benchmark award for attorney's fees. *Hanlon v. Chrysler*  
16 *Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998).

17 Class counsel seeks \$300,000 in attorney's fees — or 25 percent of the gross settlement  
18 fund and approximately 3.7% more than the claimed lodestar (up until July 2, 2019) of  
19 \$289,101.50. Counsel conducted motion practice and discovery, and engaged in significant  
20 settlement negotiations in this case. Moreover, counsel also worked on a contingent-fee basis  
21 despite the risks of litigation for approximately two years. All of these factors weigh in favor of  
22 an attorney's fees payment in line with our court of appeals' benchmark of 25 percent.

23 However, in light of the \$13,290.79 in expenses and \$500 incentive award claimed in this  
24 case, the \$1.2 million recovery is reduced to a net settlement fund of \$1,186,209.21. Such a fee  
25 would come out of the pocket of class members. A resulting award of \$296,552 representing  
26 25% of the net settlement fund is fair, adequate, and reasonable. The request for attorney's fees  
27 is accordingly **GRANTED** in the amount of \$296,552. Half of this amount shall be paid after the  
28 "effective date" as defined in the settlement agreement. The other half shall be paid when class

1 counsel certify that all funds have been properly distributed and the file can be completely  
2 closed.

3 **CONCLUSION**

4 For the reasons stated above, final approval of the proposed class settlement is  
5 **GRANTED**, approval of the settlement of the FLSA claims is **GRANTED**. Having considered class  
6 counsel's motion for attorney's fees, reimbursement of expenses, and an incentive award, the  
7 undersigned hereby awards class counsel attorney's fees of \$296,552. Half of this amount shall  
8 be paid after the "effective date" as defined in the settlement agreement. The other half shall be  
9 paid when class counsel certify that all funds have been properly distributed and the file can be  
10 completely closed. Class counsel shall also receive \$13,290.79 as reimbursement for their  
11 litigation expenses, to be immediately paid from the settlement fund. The class representative  
12 shall receive a \$500 enhancement award to be immediately paid from the settlement fund.  
13 Judgment will be entered separately.

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15 **IT IS SO ORDERED.**

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17 Dated: August 26, 2019.

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20 WILLIAM ALSUP  
21 UNITED STATES DISTRICT JUDGE  
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